

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11509-RWZ

MARC GINSBURG

v.

MATTHEW DINICOLA,
d/b/a SIGNATURE COLLISION

MEMORANDUM OF DECISION

June 7, 2007

ZOBEL, D.J.

I. Background

Plaintiff Marc Ginsburg ("Ginsburg") brings this action for damages against defendant Matthew Dinicola ("Dinicola") to compensate plaintiff for losses sustained as a result of the purchase of an automobile through the internet auction site eBay. Plaintiff alleges violations of the civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962 and 1964, common law fraud and conversion/misappropriation. Defendant has moved to dismiss all claims on the grounds that: (1) the court lacks jurisdiction under Fed. R. Civ. P. 12(b)(2); and (2) the complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). (Docket # 3.) For the reasons discussed below, the motion to dismiss is allowed.

II. Facts

In June 2006, defendant Dinicola listed for sale via the Ebay, Inc., internet auction website a “complete frame off restoration” of a vintage 1970 Chevelle Convertible LS6. (Docket # 1, Complaint, Ex. A.) The listing advertisement stated that the Chevelle was a “numbers matching” vehicle with a confirmatory “build sheet and protecto plate.” (Id.) Defendant Dinicola operated Signature Collision in Spencerport, New York, a company which restores and sells used automobiles throughout the United States. Plaintiff Ginsburg, a resident of Tewksbury, Massachusetts, bid \$150,100 for the automobile. The auction closed on July 11, 2006, and Dinicola notified Ginsburg that he was the highest bid for the Chevelle. On July 12, 2006, Ginsburg wired the purchase money into Dinicola’s bank account, which was located in Rochester, New York.

After taking possession of the automobile in Rochester and transporting it back to Tewksbury, plaintiff concluded that the automobile was a “fake.” He had the vehicle inspected by a professional appraiser who concluded that the vehicle was a “reproduction or clone of that make and model [1970 Chevelle Convertible LS6] and not an authentic frame off restoration or an original matching numbers vehicle.” (Docket # 1, Complaint ¶ 20 & Ex. D.) The appraiser further concluded that “the engine and transmission had been re-stamped with the VIN number for the automobile even though they were not the original engine or parts.” (Id. at ¶ 22.) Plaintiff then filed the instant suit in the District of Massachusetts.

III. Discussion

Plaintiff alleges that in advertising and selling a “fake” 1970 Chevelle Convertible LS6, defendant: (1) violated the civil RICO statute in that he “knowingly and

intentionally transmitt[ed] and/or caused to be transmitted in interstate commerce by means of wire, internet and telephone services, communications which were materially false in violation of 18 U.S.C. § 1343" (Docket # 1, Complaint ¶ 29); (2) committed fraud by making "intentional misrepresentations of material facts to [plaintiff]" (id. at ¶ 38); and (3) engaged in conversion/misappropriation in that he "wrongfully received the sum of \$150,100.00 from [plaintiff] by means of fraud and/or his use of false pretenses." (Id. at ¶ 44.)

The first issue presented is whether this court may constitutionally exercise personal jurisdiction over defendant Dinicola, who is a resident of Spencerport, New York. Plaintiff contends that this court has jurisdiction over defendant based on: (1) the Massachusetts long-arm statute; and (2) the jurisdictional provisions of the civil RICO statute.

A. Long-Arm Jurisdiction

In general, courts may exercise either general or specific jurisdiction over a defendant. See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998). To exercise general jurisdiction, the defendant must have "continuous and systematic" contacts with the forum state. Id. Here, plaintiff does not contend that defendant's contacts with Massachusetts are continuous or systematic enough to establish general jurisdiction.

Therefore, the relevant inquiry here is whether the court has specific jurisdiction under Massachusetts law. Specific jurisdiction exists where there is a "demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities." Id. Such a determination requires both: (1) that the contacts satisfy the Massachusetts long-arm

statute; and (2) “that the exercise of jurisdiction under the statute is consistent with the [due process provisions of the] constitution.” Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002). First, the exercise of jurisdiction must comport with the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3, which provides for personal jurisdiction over a defendant if the cause of action arises from the defendant’s:

- (a) transacting any business in this commonwealth;
- (b) contracting to supply services or things in this commonwealth;
- (c) causing tortious injury by an act or omission in this commonwealth;
- (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered

Mass. Gen. Laws ch. 223A, § 3. Second, for the exercise of jurisdiction to comport with due process, the defendant must have “minimum contacts” with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Daynard, 290 F. 3d at 52 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted)).

Here, plaintiff contends that defendant “transacted business” in the state within the meaning of the long-arm statute, § 3(a). (See Docket # 5, Pl’s. Opp. to Def.’s Mot. to Dismiss, 8-10). In general, courts have interpreted the state’s long-arm statute, particularly, § 3(a), “transacting business,” broadly. The Supreme Judicial Court has instructed:

The statute's reference to "transacting any business" does not require that the defendant have engaged in commercial activity. That language is general and applies to any purposeful acts by an individual, whether personal, private, or commercial.

Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 982 (1st Cir. 1986) (quoting Ross v. Ross, 371 Mass. 439, 441 (1976)).

In order to determine the extent and nature of defendant's contacts with Massachusetts, the court must first examine the architectonics of the eBay internet auction website, located at <http://www.eBay.com> (last visited June 6, 2007). The site allows sellers using a template to advertise an item on the website. See Action Tapes, Inc. v. Weaver, No. 3:05-cv-1693-H, 2005 WL 3199706, at *2 & n. 2 (N.D. Tex. Nov. 23, 2005). The seller chooses a minimum bid and establishes a time frame (including expiration) for the auction. Id. Buyers bid for the item during the duration of the auction by entering bids in a template. Id. When the auction period expires, the bidder with the highest bid wins the auction and owns the item. Id. eBay electronically notifies both the buyer and seller of the result of the auction and contact information for both. Id. The buyer may then remit payment through PayPal, a payment mechanism service owned by eBay, or the parties may privately arrange payment.

Courts have recognized that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (describing a "sliding scale" analysis to be used in determining whether courts may constitutionally exercise

personal jurisdiction over a defendant).¹ Several courts have declined to exercise personal jurisdiction over a defendant under state long-arm statutes on the basis of sales or purchases made on eBay on the ground that such contacts do not constitute sufficient minimum contacts. See Action Tapes v. Weaver, No. 3:05-cv-1693-H, 2005 WL 399706, at *3 (N.D. Tex. Nov. 23, 2005) (collecting cases; noting that “[c]ourts that have looked at the question of personal jurisdiction based on eBay transactions have uniformly held that the usual online auction process does not rise to the level of purposeful conduct required to assert specific jurisdiction”). Such courts have reasoned that where the auction allows any purchaser to purchase the item and the seller engages in only one sale to a forum state, there is no jurisdiction. For example, the court in Machulsky v. Hall, 210 F. Supp. 2d 531, 541-42 (D. N.J. 2002) reasoned:

Although eBay is an interactive web site which allows users to engage in commercial transactions and exchange information with others via its host server, [defendant’s] single purchase from [plaintiff] through eBay does not constitute the requisite ‘purposeful availment of doing business’ within New Jersey such that the exercise of specific jurisdiction over Defendant would be appropriate . . . [defendant] engaged in only one commercial transaction via eBay and this single purchase, without more, is not a sufficient premise upon which the Court can exercise personal jurisdiction. [Defendant’s] email correspondence with [plaintiff] relating to his single purchase also did not occur within the context of other substantial connections to the forum. He has never traveled to New

¹ Plaintiff relies heavily on Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), in support of his contention that the court has jurisdiction over the defendant here. In that early case determining the contours of personal jurisdiction in the context of internet sales and purchases, the court established a “sliding scale” to determine whether a court could exercise personal jurisdiction over a defendant. However, this scale has been applied in cases in which the issue is a defendant’s conduct on a website that defendant controls. See, e.g., McGuire v. Lavoie, No. 3:03-CV-0161-BH, 2003 WL 23174753 (N.D. Tex. Aug. 19, 2003) (“Because a majority of the cases applying the Zippo test involve a defendant’s conduct over its own website, its application to an internet auction site is questionable.”).

Jersey, and [plaintiff] fails to make a prima facie showing that he has engaged in a substantial amount of transactions with [plaintiff] or other New Jersey residents via the eBay service. [] Such minimal correspondence with [plaintiff], by itself or even in conjunction with his single purchase, does not constitute sufficient minimum contacts.

Id. (emphasis added). See also Boschetto v. Hansing, No. C-06-1390-VRW, 2006 WL 1980383, at *4 (N.D. Cal. July 13, 2006) (granting defendant's motion to dismiss for lack of personal jurisdiction where defendant sold a car to plaintiff via eBay on the ground that "[e]xercising personal jurisdiction would be improper here because [defendant's] actions were not purposefully directed at the forum state. Auction sales on eBay are random and attenuated, and the choice of [the] highest bidder is . . . beyond the control of the seller") (internal quotations omitted); Gossett v. HBL, LLC, No. 2:06-cv-123-CWH, 2006 WL 1328757, at *4-*5 (D. S.C. May 11, 2006) (denying motion for reconsideration of court's grant of defendant's motion to dismiss for lack of personal jurisdiction on the ground that "[a] copy of the eBay listing indicates that any eBay user worldwide could have purchased the Porsche providing that the buyer pay for shipping. [Defendant] did not direct its activities at South Carolina"); United Cutlery Corp. v. NFZ, Inc., Civ. No. CCB-03-1723, 2003 WL 22851946, at *4 (D. Md. Dec. 1, 2003) (granting defendant's motion to dismiss for lack of personal jurisdiction where defendant sold allegedly counterfeit swords and cutlery that infringed plaintiff's copyright on eBay; court concluded "[defendant] exercised no authority over maintenance of the websites, nor did he exert control over the audience they targeted. Given this lack of control, the court finds no evidence that [defendant] directed electronic activity into Maryland") (internal quotations omitted); Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000) (granting motion to

dismiss for lack of personal jurisdiction on the ground that defendant lacked sufficient minimum contacts with Michigan where defendant made sales on eBay in which sales to Michigan residents, while not targeted, were frequent; court reasoned “[p]laintiff identifies no continuing relationship between Defendant and anyone or anything in Michigan, save the [] purchases made from Plaintiff itself”); cf. McGuire v. Lavoie, No. 3:03-cv-0161-BH, 2003 WL 23174753, at *4-*5 (N.D. Tex. Aug. 19, 2003) (denying defendant’s motion to dismiss for lack of personal jurisdiction where eBay seller ended the auction and completed a sale of 20 tractors to buyer; contacts included eBay, email, telephone, facsimile, and regular mail).

Here, there is no evidence that the defendant had any additional contacts with Massachusetts other than the single sale on the eBay website. Accordingly, this court does not have jurisdiction under the Massachusetts long-arm statute. Since the exercise of jurisdiction over the defendant here does not satisfy the Massachusetts long-arm statute, I do not reach the question whether the exercise of such jurisdiction would comport with the constitutional due process requirements.

B. Civil RICO Statute

Plaintiff also contends that this court has “nationwide” jurisdiction under the civil RICO statute, 18 U.S.C. § 1965, which provides, in pertinent part: “[any civil action or proceeding under this chapter against any person may be instituted in the district of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.” 18 U.S.C. § 1965(a). The statute further provides: “[a]ll other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts

his affairs.” 18 U.S.C. § 1965(d). However, courts have not interpreted § 1965 to confer personal jurisdiction over any defendant, wherever found. Rather, as the Second Circuit in PT United Can Co., Ltd. v. Crown Cork & Seal Co., Inc., 138 F.3d 65, 71 (2d Cir. 1998), explained:

Reading all of the subsections of § 1965 together, the court finds that § 1965 does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found. First, §1965(a) grants personal jurisdiction over an initial defendant in a civil RICO case to the district court for the district in which that person resides, has an agent, or transacts his or her affairs. In other words, a civil RICO action can only be brought in a district where personal jurisdiction based on minimum contacts is established as to at least one defendant.

Id. at 71 (emphasis added). See also AGS Int’l Servs. S.A. v. Newmont USA Ltd., 346 F. Supp. 2d 64, 87 (D.D.C. 2004) (adopting reasoning of PT United Can Co. and concluding that court lacked jurisdiction over Peruvian mining company; “§ 1965 requires [] that at least one defendant have minimum contacts with the [forum state].”). Therefore, the civil RICO statute does not provide an independent basis for jurisdiction in this case.²

IV. Conclusion

Accordingly, defendant’s motion to dismiss (Docket # 3) is ALLOWED. Judgment may be entered dismissing the complaint.

² Since I allow defendant’s motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), I do not reach defendant’s contention that the complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6).

June 7, 2007

DATE

/s/Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE